United States Courts
Southern District of Texas
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Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, Plaintiff, VS. ENRON CORP., ET AL., Defendants.	§	Consolidated Lead No. H-01-3624
AMERICAN NATIONAL INSURANCE COMPANY, ET AL., Plaintiffs, VS. J.P. MORGAN CHASE & COMPANY, Defendant.	§	Civil Action No. G-02-0299

DEFENDANT J.P. MORGAN CHASE & CO.'S OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION AND REQUEST FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

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Defendant J.P. Morgan Chase & Co. ("JPMorgan Chase") respectfully submits this memorandum in opposition to the Motion for Reconsideration and Request for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) filed by Plaintiffs American National Insurance Company, *et al.* (collectively, the "Plaintiffs").

Preliminary Statement

Plaintiffs commenced this case by filing their Petition against JPMorgan Chase in Texas state court. JPMorgan Chase timely removed this action to the United States District Court for the Southern District of Texas, Galveston Division. This matter was transferred to this Division and consolidated into the lead *Newby* case by Orders dated May 7 and May 14, 2002.

Plaintiffs moved to remand this matter to state court. In opposing the Motion to Remand, JPMorgan Chase argued that this case was related to the Enron bankruptcy on three grounds. First, the Plaintiffs, as holders of preferred stocks, bonds, and commercial paper of Enron, are claimants in the Enron bankruptcy and their action in this Court will affect those claims.[1] Second, as a result of this action, JPMorgan Chase may have rights to contribution from Enron's estate, which may be asserted by proof of claim in the Enron bankruptcy. Third, JPMorgan Chase also has potential claims for contribution against Enron's directors and officers, whose potential liability implicates insurance policies of approximately $450 million that are part of Enron's bankruptcy estate.

In its August 9, 2002 Memorandum and Order ("August 9 Order"), the Court "agree[d] with JPM[organ Chase]." August 9 Order at p. 13. The Court stated

> Any of these claims "could alter the debtor's rights, liabilities, options, or freedom of action" or otherwise affect "the handling or administration of the [Enron] bankrupt estate." *Fed. Deposit Ins. Corp. v. Majestic Energy Corp. (In re Majestic),* 835 F.2d 87, 90

[1] To the extent Plaintiffs are able to recoup all or a portion of their damages in this action, their claims against the Enron bankruptcy case will be reduced or eliminated.

(5^{th} Cir. 1988). Thus Enron and its assets are potentially exposed to liability through this suit.

Id. The Court went on to note, as to JPMorgan Chase's contribution claims against Enron and its officers and directors: "Moreover, JPM is named as a defendant in the consolidated class action complaints in *Newby v. Enron Corp.,* H-01-3624, and *Tittle v. Enron Corp.*, H-01-3913, MDL 1446, raising the specter of a significant impact on Enron's bankrupt estate should JPM's potential claim for indemnity and contribution succeed." *Id.,* at 15-16.[2]

Plaintiffs now move for reconsideration, arguing that JPMorgan Chase has no claim for contribution against Enron, and that JPMorgan Chase's contribution claims against Enron's officers and directors do not create "related to" bankruptcy jurisdiction because the proceeds of Enron's directors and officers liability policies are purportedly not property of the Enron bankruptcy estate. Alternatively, Plaintiffs ask the Court for its permission to appeal immediately the Court's determination that there is "related to" bankruptcy jurisdiction.

As demonstrated below, Plaintiffs' motion should be denied.

First, Plaintiffs do not satisfy or even attempt to satisfy the requirements for this Court to reconsider its denial of Plaintiffs' Motion To Remand.

Second, Plaintiffs have failed to contest that the outcome of this case will affect Plaintiffs' own claims in the Enron bankruptcy case, or that such an effect establishes "related to" bankruptcy jurisdiction.

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[2] In its August 9 Order, this Court also (a) denied Plaintiffs' request that the Court abstain from hearing this case and (b) held that removal to the Southern District of Texas (rather than to the "home" bankruptcy court) was appropriate under the "unusual, if not unique" circumstances of the Enron litigation. August 9 Order at pp. 16-21. Plaintiffs do not challenge these aspects of the Order.

The August 9 Order additionally denied JPMorgan Chase's separate Motion to Dismiss Plaintiffs' Original Petition, but ordered that Plaintiffs file an amended pleading. Plaintiffs' First Amended Complaint ("Amended Complaint," "Am. Compl."), filed on August 30, 2002, failed to cure the deficiencies of the original pleading and, accordingly, on September 9, 2002, JPMorgan Chase again moved to dismiss.

Third, JPMorgan Chase does have potential claims for contribution and/or indemnity against the Enron estate, which establish "related to" bankruptcy jurisdiction.

Fourth, this action is also related to the Enron bankruptcy because JPMorgan Chase's contribution and/or indemnity claims against Enron's directors and officers implicate directors and officers insurance policies ("D & O policies") and their proceeds, which are the property of the Enron estate.

Finally, Plaintiffs do not meet the standard for Section 1292(b) appeals.

Argument

POINT I

PLAINTIFFS' MOTION DOES NOT PROVIDE A BASIS FOR THIS COURT TO RECONSIDER ITS AUGUST 9 ORDER

Rule 60 of the Federal Rules of Civil Procedure[3] provides:

> On motion . . . the court may relieve a party . . . [from an] order . . . for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . . . (3) fraud . . . misrepresentation, or other misconduct . . . . (4) the judgment is void; (5) the judgment has been satisfied . . .

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[3] Plaintiffs do not specify the basis for their Motion for Reconsideration. As the United States Court of Appeals for the Fifth Circuit has explained, "The Federal Rules of Civil Procedure do not provide for a 'Motion for Reconsideration' but such motions may properly be considered either a Rule 59(e) motion to alter or amend judgment or a Rule 60(b) motion for relief from judgment." *Hamilton Plaintiffs v. Williams Plaintiffs,* 147 F.3d 367, 371 n.10 (5th Cir. 1998). *See also Cusachs v. Orkin Exterminating Co.*, No. CIV.A.00-2100, 2000 WL 1789971 at *1 (E.D. La. Dec. 6, 2000) ("The Federal Rules . . . do not formally recognize a motion to reconsider *in haec verba.*"). Here, only Rule 60(b), entitled "Relief From Judgment or Order," potentially applies. Rule 59(e), entitled "New Trials; Amendment of Judgments," requires that a movant seek relief within 10 days. Fed. R. Civ. P. 59(e); *see also Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 353 (5th Cir. 1993) (explaining distinction that a motion filed within 10 days of the judgment is a Rule 59(e) motion, as opposed to a Rule 60(b) motion); *Cusachs,* 2000 WL 1789971 at *1 (motion filed after 10 days was a Rule 60(b) motion because "the Fifth Circuit has held that a motion for reconsideration . . . may be classified under either Rule 59 or Rule 60, depending on the time of filing.") (internal citations omitted). Plaintiffs filed their Motion for Reconsideration on September 3, 2002, twenty-five days after this Court entered its Order denying Plaintiffs' Motion to Remand on August 9, 2002.

> or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief . . . .

Fed. R. Civ. P. 60(b).

Relief under Rule 60(b) is an extraordinary remedy and thus " extraordinary circumstances are required to obtain relief." *Dyll v. Adams,* No. Civ. A. 3:91-CV-2734-D, 1999 WL 447069 at *2 (N.D. Tex. June 30, 1999) (citing *Carter v. Fenner*, 136 F.3d 1000, 1007 (5th Cir. 1998)). *Accord Cusachs*, 2000 WL 1789971 at *2 ("[a] court's reconsideration of a prior order is an extraordinary remedy which should be used only sparingly."). Furthermore, the courts in this Circuit have made clear that Rule 60(b) is not a "means to relitigate the merits." *Optimal Health Care Servs., Inc. v. Travelers Ins. Co.,* 801 F. Supp. 1558, 1561 (E.D. Tex. 1992). *See also Fidelity & Deposit Co. of Maryland v. Omni Bank*, No. Civ. A. 99-1167, 1999 WL 970526, *3 (E.D. La. Oct. 21, 1999) (in considering standard under Rule 59, court explained that the motion "cannot be used to relitigate issues with new arguments that could and should have been presented before the judgment was entered.").

Plaintiffs have presented no extraordinary circumstances that merit relief, and instead merely seek to reargue issues upon which they already failed to prevail. Plaintiffs are alleging (1) no mistake, inadvertence, surprise or excusable neglect, (2) no new evidence, (3) certainly no fraud, and they do not allege that (4) the judgment is void, (5) has been satisfied (or that any necessary judgment has been reversed), or (6) any other reasons justifying relief. In other words, Plaintiffs only seek to reargue the original motion to remand with additional authorities they could have referred to in their original motion. Even now, Plaintiffs fail to show that the Court's prior determination was wrong or, for that matter, to address all the bases on which the Court found it has "related to" jurisdiction over this action. Plaintiffs' motion can and should be denied for this preliminary reason.

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POINT II

THIS ACTION WAS PROPERLY REMOVED BASED ON "RELATED TO" BANKRUPTCY JURISDICTION

Even if the Court proceeds to the "merits" of Plaintiffs' reargument, the Motion for Reconsideration should be denied. Plaintiffs do not, and cannot, dispute that the United States Court of Appeals for the Fifth Circuit and its sister circuits have liberally construed their bankruptcy removal powers under 28 U.S.C. Sections 1334(b) and 1452 to give effect to Congress's intent to broadly grant federal jurisdiction to adjudicate disputes that could impact a bankruptcy. *See, e.g., In re Majestic,* 835 F.2d at 90 ("whether federal jurisdiction over bankruptcy cases and proceedings exists is determined under § 1334(b), which is to be read as a broad grant of jurisdiction"); *In re Sunpoint Secs., Inc.,* 262 B.R. 384, 392 n.21 (Bankr. E.D. Tex. 2001) ("[t]he key word in the . . . test is 'conceivable,' which makes the jurisdictional grant extremely broad.") (internal quotations and citations omitted). Indeed, Plaintiffs themselves summarize the Fifth Circuit test "for 'related to' bankruptcy jurisdiction" as "whether 'the outcome of that proceeding could conceivably have any effect of [*sic*] the estate being administered in bankruptcy.'" Motion for Reconsideration at p. 3 (citing *In re Wood,* 825 F.2d 90, 93 (5th Cir. 1987) (adopting the Third Circuit's formulation in *Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3d Cir. 1984)).[4] Plaintiffs further concede that "a claim for contribution may be an adequate basis for 'related to' bankruptcy jurisdiction." *Id.* (citing *Arnold v. Garlock, Inc.,* 178 F.3d 426, 434-435 (5th Cir. 2001)). In other words, the Fifth Circuit standard requires only that JPMorgan Chase demonstrate the possibility of an effect by this case on the Enron bankruptcy. JPMorgan Chase has done that on three independent bases.[5]

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4 *See also In re Canion,* 196 F.3d 579, 587 (5th Cir. 1999) ("[T]le law is well established in this Circuit, as in others, that, when testing "related to" jurisdiction, an effect is not required to a certainty. Rather jurisdiction will attach on a finding of any *conceivable* effect.") (emphasis in original).

5 In footnote 2 of its August 9 Order, this Court rejected Plaintiffs' argument (repeated now in the Motion for Reconsideration) that JPMorgan Chase did not sufficiently "analyze" each of its potential contribution claims. As this Court properly held, to establish "related to" jurisdiction, the Fifth Circuit does not require detailed proofs concerning such claims. This Court directed the parties to *In re Wood,* which clearly explains that the Fifth Circuit demands only the showing of claims with a "potential effect" on the bankrupt estate. August 9 Order at p. 11 n.2; *In re Wood,* 825 F.2d at 94 ("[a]lthough we acknowledge the possibility that this suit may ultimately have no effect on the bankruptcy, we cannot conclude . . . that it will have no *conceivable* effect. . . . We raise these possibilities, not to resolve them, for that matter is left to the district and bankruptcy courts to decide under federal law, but to illustrate the conceivable effect of the complaint on the administration of the bankruptcy.") (emphasis in original). *See also Biglari Import & Export, Inc. v. Nationwide Mut. Fire Ins. Co.,* Civ. No. SA-92-CA-238, 1992 WL 219012, *1 (W.D. Tex. Apr. 23, 1992) ("The key word in this test is 'conceivable'; certainty, or even likelihood is not a requirement.").

A. Plaintiffs' Own Claims Against The Enron Estate May Be Affected By The Outcome Of This Case And, Thus, This Case Is "Related To" the Enron Bankruptcy

Plaintiffs have never disputed (not in the original Motion to Remand or now) that "as holders of preferred stocks, bonds, and commercial paper of Enron . . . Plaintiffs are claimants in Enron's bankruptcy and this action will potentially affect those claims." August 9 Order at 12 (summarizing JPMorgan Chase's argument). The possibility that Plaintiffs' claims may be reduced or eliminated by a recovery against JPMorgan Chase unquestionably could have a "conceivable effect" on the Enron bankruptcy. *See, e.g., In re Canion*, 196 F.3d at 588 (finding "related to" jurisdiction where "possibility . . . that [plaintiff's] judgment against [bankrupt estate] would be satisfied by the defendants and [plaintiff's] claim against the [bankrupt estate] would evaporate, thereby reducing the liabilities of the estate and producing an effect sufficient to confer 'related to' jurisdiction"). This conceivable effect establishes "related to" jurisdiction.

B. JPMorgan Chase's Potential Contribution Claims Against Enron Also Establish "Related To" Bankruptcy Jurisdiction

This Court need only look as far as Plaintiffs' own claims to see JPMorgan Chase's potential claims for contribution and/or indemnity. The Amended Complaint seeks recovery for "aiding and abetting", "facilitat[ing]" and/or "act[ing] in concert [] in furtherance of" Enron's alleged fraudulent acts in violation of the Texas Securities Act and common law. Amend. Compl. ¶¶ 13, 17, 23, 44, 50, 53, 55, 57, 60, and 64. Plaintiffs' allegations further seek recovery for JPMorgan Chase's alleged conspiracy with Enron to commit those acts. *Id.* at ¶¶ 19, 44, 50, 53, 55, and 60. It is exactly in cases like this, where one alleged wrongdoer is alleged to have acted in concert with another, that contribution and/or indemnity claims arise. Indeed, that is the very definition of contribution. *See* BLACK'S LAW DICTIONARY 328 (7th ed. 1999) ("**Contribution** . . . . the right to demand that another who is jointly responsible for a third party's injury supply part of what is required to compensate the third party" (emphasis in original) (internal citations omitted)).

Plaintiffs argue that JPMorgan Chase has no contribution claim against Enron for two reasons, each of which is without merit. First, Plaintiffs say that contribution cannot be "recovered from a party against whom the injured party has no cause of action." Motion for Reconsideration at p. 5 (citations omitted). But Plaintiffs have not asserted, let alone shown, that they do not have a claim against Enron. To the contrary, Plaintiffs' Amended Complaint makes clear that Plaintiffs believe they were defrauded *by Enron* and that JPMorgan Chase is being sued as an alleged aider and abettor in *Enron's* fraud. *See, e.g.,* Am. Compl. ¶¶14 (Enron was "misleading investors and/or shareholders about [its] true financial health"), 16 ("Enron's financial statements were materially misstated"). Enron's bankruptcy did not eliminate Plaintiffs' cause of action against Enron; rather, the Bankruptcy Code stayed Plaintiffs' ability to assert the claim other than by proof of claim in the New York bankruptcy case. *See* 11 U.S.C. § 362(a) (imposing automatic stay); *id.* at § 501, *et seq.* (providing for the filing and allowance of proofs of claim).

Plaintiffs' second argument is equally flawed. Plaintiffs first state, incorrectly, that JPMorgan Chase relies on Section 33.012 of the Texas Civil Practice and Remedies Code for its right of contribution from Enron. Then Plaintiffs state that elsewhere in Chapter 33 of that Code, bankrupt entities are excluded from the definition of "responsible third party" from whom contribution may be sought. *See* Motion for Reconsideration at pp. 5-6. Plaintiffs are wrong in both their premise and their conclusion. As to the premise, the Texas statute that JPMorgan Chase referred to as one of the bases for its contribution claim is Section 32.002.[6] Section 32.002 is found in Chapter 32 of the Texas Civil Practice and Remedies Code, to which the definition or concept of "responsible third party" found in Chapter 33 has no application. *See* TEXAS CIV. PRAC. & REM. CODE § 33.011 (making clear that definitions, including definition of "responsible third party" apply only "[i]n this chapter", *i.e.,* Chapter 33). And the importance of the definition of "responsible third party" in Chapter 33 is that it defines who a defendant may seek to join in a Texas state court action. *See* TEXAS CIV. PRAC. & REM. CODE § 33.004 ("a defendant may seek to join a responsible third party who has not been sued by the claimant."). Thus, Section 33 does not limit, or even speak to, the right of JPMorgan Chase to assert its claims, including those for contribution and indemnity, in the Enron bankruptcy case pending in the Southern District of New York.

It should be noted that Section 33's definition of "responsible third party" does not exclude all bankruptcy debtors and, in particular, would not exclude Enron. Instead, even within the context of Section 33, a bankruptcy debtor may be joined as a defendant in a Texas action "to the extent that liability insurance or other source of third party funding may be available to pay claims against the debtor." TEXAS CIV. PRAC. & REM. CODE § 33.011(6)(B)(ii). Here, it appears—based on the Enron Official Committee of Unsecured Creditors' submission to the Enron bankruptcy court—that the same D & O policies that insure the Enron directors and officers with respect to JPMorgan Chase's potential contribution claims, *see* Point II.C. *infra*, also provide Enron with "entity" coverage that insures Enron "for 'Securities Claims,' in which Enron is a defendant and that directly relate to a claim which, if made against a Director or Officer, would be covered by the D & O policies." Objection of Creditors' Committee to motions for payment and/or advancement of defense costs, dated April 8, 2002 (a copy of which is annexed hereto as Exhibit A), at p. 6. Thus, even if Plaintiffs were correct that Texas law precluded contribution claims against bankruptcy debtors that were not "responsible third parties," that would not bar JPMorgan Chase's contribution claims against *this* bankruptcy debtor which *is* a "responsible third party."[7]

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6 Due to a typographical error, JPMorgan Chase's Opposition to Plaintiffs' Motion to Remand referred to Section 32.002 as "Section 32.012." *See* JPMorgan Chase's Opposition at p. 17.

7 For this and several other reasons, *Arnold v. Garlock, Inc.,* 278 F.3d 426 (5th Cir. 2001), does not apply. There, the court declined to stay pending appeal the remand of a number of asbestos-related personal injury actions. In going through the list of reasons why the court concluded that appellant had not demonstrated a likelihood of success on the merits of the appeal, the court cited Section 33's definition of a "responsible third party" for the proposition that Texas law eliminates a debtor in bankruptcy as one from whom contribution may be sought. Significantly, there was no showing in *Arnold* that the bankruptcy debtor had insurance. Moreover, the *Arnold* court did not consider Section 32.002. Finally, the court did not consider the contribution law of any state other than Texas, because the defendant in the case before it had "asserted its contribution rights entirely under Texas state law." *Id.* at 435. As is discussed below, that is not the case here.

In any event, JPMorgan Chase's indemnity rights are not based solely on Texas law. Those rights will be asserted by proof of claim filed in the Southern District of New York Bankrupcty Court, which would apply New York choice of law rules to JPMorgan Chase's claim, and which in turn would choose New York law as the substantive law to be applied to JPMorgan Chase's contribution claims against Enron.[8] And New York law clearly affords rights to contribution and/or indemnification in the circumstances of this case. *See* N.Y. C.P.L.R. § 1401 (2002) ("[T]wo or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.").

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8 Federal courts apply the choice of law rules of the forum state—here New York—to determine which state's law governs the contribution question with respect to state law claims. *First Fed. Savings & Loan Ass'n of Pittsburgh v. Oppenheim, Appel, Dixon & Co.*, 631 F. Supp. 1029, 1032 (S.D.N.Y. 1986). Under New York choice of law rules, courts follow the approach of "giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation." *Dep't of Econ. Dev. v. Arthur Andersen & Co.*, 747 F. Supp. 922, 935 (S.D.N.Y. 1990) (internal quotations and citations omitted) (finding that New York law relating to contribution among intentional tortfeasors was applicable to defendant/third-party plaintiffs' common law fraud claims). Here, New York has the greatest interest in JPMorgan Chase's potential contribution claim against Enron. JPMorgan Chase is headquartered in New York and its stock, as well as Enron's, is traded on the New York Stock Exchange. JPMorgan Chase's alleged acts of participating and structuring prepay transactions were centered in New York, where its Global Commodities Group was headquarted. The potential injury to JPMorgan Chase giving rise to contribution claims (*i.e.*, the payment of a money judgment) would occur in New York. New York clearly has the greatest concern with the specific issue whether JPMorgan Chase may recover from Enron all or a portion of amounts JPMorgan Chase may be required to pay to the Plaintiffs.

Finally, even if the choice-of-law analysis would not otherwise result in the application of New York law to a contribution claim by JPMorgan Chase asserted in the Enron bankruptcy case, New York choice of law rules prohibit courts from applying a rule of law of another state when to do so would violate New York public policy. *Metro. Model Agency USA, Inc., v. Rayder*, 168 Misc.2d 324, 327, 643 N.Y.S.2d 923, 926 (N.Y. Sup. Ct. 1996). New York's "strong public policy to hold a co-tortfeasor . . . responsible to the other tortfeasors for its proportionate share of a plaintiff's injury" would thus mandate the application of New York law if it were the case, as Plaintiffs allege, that Texas law precludes JPMorgan Chase's contribution claims. *Ackerman v. S. Wood Piedmont Co.*, 409 F. Supp. 469, 472 (E.D.N.Y. 1976).

C. This Action Is Also "Related To" The Enron Bankruptcy Because JPMorgan Chase Has Potential Claims for Contribution And/Or Indemnity Against Enron Directors And/Or Officers

JPMorgan Chase has demonstrated, and Plaintiffs do not contest, that JPMorgan Chase has potential claims for contribution from Enron's directors and officers for any damages JPMorgan Chase may sustain in this action. This Court has found, and the Plaintiffs do not contest, that these claims implicate liability insurance policies of approximately $450 million that are being administered as part of the Enron estate. *See* August 9 Order at 12, 15-16; *see also* Order Lifting Automatic Stay, to the Extent Applicable, to Permit Parties to the Debtors' Directors and Officers Liability Insurance and ERISA Fiduciary Liability Insurance Policies to Exercise Contractual Rights Thereunder, Case No. 01-16034 (AJG), 2002 Bankr. LEXIS 544 (Bankr. S.D.N.Y. May 17, 2002) (asserting jurisdiction over Enron D & O policies, lifting stay, and permitting the exercise of rights pursuant to policy).

On their Motion for Reconsideration, Plaintiffs argue that "[i]n determining 'related to' bankruptcy jurisdiction, the issue is not who purchased the policy, but who may receive the proceeds." Motion for Reconsideration at p. 6. However, the case cited by Plaintiffs, *Equinox Oil Co. v. Antill Constr. Co.*, No. Civ. A. 00-3320, Civ. A. 00-3502, 2001 WL 649806 at *5-11 (E.D. La. June 11, 2001), says nothing of the sort. Indeed, *Equinox* has nothing to do with removal or the test for "related to" jurisdiction. The case concerned an appeal of a bankruptcy court's decision to allocate the D & O proceeds to be paid to particular creditors, and the only jurisdictional question presented was whether the Fifth Circuit had jurisdiction to hear the appeal, not whether original federal subject matter jurisdiction existed at the outset.

Nonetheless, the *Equinox* decision found that the D & O policy in question and its proceeds were part of the bankrupt estate, and in so doing outlined its jurisprudence concerning D & O policies and their relationship to a bankrupt estate. The Court reminded the lower court that

> The statutory definition of the property of a bankrupt estate appears to clearly encompass the proceeds of this indemnification [the D & O] policy . . . . [T]he United States Supreme Court has held that the statutory definition of property of the estate is to be interpreted broadly, not narrowly, citing Congressional intent to draw as much property within the bankrupt estate in order to facilitate rehabilitation of the business . . . .

Id. at *4 (internal citations omitted).

Plaintiffs also point to an older case, *Louisiana World Exposition, Inc. v. Fed. Ins. Co. (In re Louisiana World Exposition),* 832 F.2d 1391 (5th Cir. 1987), to buttress their argument that the D & O policies are not part of the Enron estate. This case is of no relevance to the

Court's jurisdictional analysis here. That case, a Fifth Circuit case that has since been called into doubt,[9] concerned the efforts of a creditors' committee to enjoin and enforce a stay of the distribution of proceeds from the D & O policies in that matter.

Assuming, *arguendo*, that *Equinox* and *Louisiana World Exposition* were applicable, the proceeds of the Enron D & O policies would be property of the bankruptcy estate. That is because Enron itself is a beneficiary of the policy. As the Enron Creditors' Committee advised the Southern District of New York Bankruptcy Court:

> In addition to providing direct insurance coverage to Debtors' current and former Officers and Directors, the D&O Policies also provide for reimbursement of the Debtors for indemnification payments made to, or on behalf of, present and former Officers and Directors. The Debtors' interest in the D&O Policies are not, however, limited solely to reimbursement or indemnification payments. Rather, <u>**the D&O Policies provide the Debtors with "Entity Coverage."**</u> Thus, under Endorsement No. 6, direct coverage is provided to the Debtors for "Securities Claims," in which Enron is a defendant and that directly relate to a claim which, if made against a Director or Officer, would be covered by the D&O Policies.

Creditors' Committee Objection, Ex. A hereto, at pp. 5-6. Accordingly, even under Plaintiffs' Fifth Circuit cases, the Enron policy and its proceeds are property of the bankruptcy estate. *See Equinox,* 2001 WL 649806 at * 5 (where "the beneficiary of the policy . . . is in fact the bankrupt entity . . . under the reasoning of *Louisiana Work Exposition*, the proceeds of this indemnification policy would be property of the bankrupt estate.")

Finally, Plaintiffs' reliance on Fifth Circuit cases misses the point that the relevant case law here is not Fifth Circuit law, but rather Second Circuit and Southern District of New York law. That is because the Enron bankruptcy case is pending in the Southern District of

9 *See Am. Nuclear Insurers v. Babock and Wilcox Co.*, No. Civ. A. 01-2751, 00-10992, 00-1188, 2002 WL 1334882 at *4 (E.D. La. June 14, 2002) ("This Court acknowledges that the Fifth Circuit jurisprudence on the policy/policy proceeds dichotomy is somewhat muddled . . . . [and] declines to reenter into the policy/proceeds thicket."), citing *In re Louisiana World Expedition,* 832 F.2d at 1399, as part of that "thicket."

New York, and it is that court which determines the scope and reach of the debtor's property in the case before it.

The Second Circuit has applied the broadest interpretation of the property of a debtor's estate: "[I]t is well established that a bankruptcy court has jurisdiction over all of the property of the debtor's estate . . . . 'the congressional goal of encouraging reorganizations . . . suggest that Congress intended a broad range of property to be included in the estate . . . . Numerous courts have determined that a debtor's insurance policies are property of the estate, subject to the bankruptcy court's jurisdiction." *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 91-92 (2d. Cir. 1988). Consistent with that encompassing approach, courts within the Second Circuit have found that property of the estate extends to insurance policies and proceeds as well. *See In re Leslie Fay Cos., Inc.*, 207 B.R. 764, 786 (Bankr. S.D.N.Y. 1997); *In re Granite Partners, L.P.,* 194 B.R. 318, 336 (Bankr. S.D.N.Y. 1996). Indeed, the Southern District of New York, ruling on "related to" bankruptcy jurisdiction, explicitly rejected an argument based on *In re Louisiana World Exposition, Inc.* that "since the policy at issue covers the directors and not the company, the policy is not part of the estate and accordingly, the outcome of the instant action is not related to the bankruptcy." *Fed. Ins. Co. v. Sheldon,* 167 B.R. 15, 19 (S.D.N.Y. 1994). The Southern District of New York held instead that "The question . . . is whether the determination of insurance coverage could conceivably have any effect on the estate being administered in bankruptcy." *Id.* In answering that question in the case before it, the Southern District of New York adopted the Ninth Circuit's reasoning that "the insurance would protect the company from potential indemnity claims from the officers and directors, and thus the policies were property of the estate because the debtor's estate was worth more with them than without them." *Id.* at 20, *citing In re Minoco Group of Cos., Ltd.*, 799 F.2d 517, 519 (9th Cir. 1986).

Similarly, in this case, Enron's D & O policies are property of the bankrupt estate. The Enron bankruptcy estate is "worth more with them than without them." J.P. Morgan Chase's potential contribution claim, which implicates those policies and how much of them will be available to satisfy the claims of other creditors against Enron or its officer and directors, clearly has a conceivable effect on the property of the Enron bankruptcy estate and on the distributions to creditors and other claimants. In short, this action is related to the *Enron* bankruptcy case.

POINT III

APPEAL OF THIS COURT'S DECISION DENYING PLAINTIFFS' MOTION TO REMAND IS NOT WARRANTED

Plaintiffs' request for permission to appeal under 28 U.S.C. § 1292 (b) is without merit. Section 1292(b) appeals are permitted only "when there is a substantial difference of opinion about a controlling question of law and the resolution of that question will materially advance, not retard, ultimate termination of the litigation." *Clark-Dietz and Assocs.-Eng'rs, Inc. v. Basic Constr. Co.*, 702 F.2d 67, 69 (5th Cir. 1983) (denying leave to appeal). *See also Powers v. Montgomery*, No. CIV. A.3:97-CV01736-P, 1998 WL 159944 (N.D. Tex. Apr. 1, 1998) (applying 1292(b) standard in denying interlocutory review of bankruptcy's order because appellant failed to establish controlling issue of law and failed to indicate any exceptional circumstances that justify need for immediate review); *In re Hunt Int'l Res. Corp.*, 57 B.R. 371 (N.D. Tex. 1985) (denying debtor's motion for leave to appeal).[10]

Here, there is no basis for an interlocutory appeal. There is no serious dispute as to the reach of "related to" jurisdiction and, hence, no dispute as to a controlling matter of law. Instead, the questions in this dispute are largely case specific, *e.g.*, whether JPMorgan Chase has

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[10] Plaintiffs complain that the "super-expansive interpretation" of "related to" bankruptcy jurisdiction would abrogate the right of securities plaintiffs to bring state law claims because "[a]lmost as a matter of course, when large-scale fraud or other serious misdeeds are revealed at publicly held corporations and shareholders begin filing lawsuits, the corporation files for bankruptcy protection." Motion for Reconsideration at p. 10. Even if the Plaintiffs' premise were true (Plaintiffs offer no support for it), the conclusion would not be supported, since federal courts can always elect to abstain from exercising their bankruptcy jurisdiction "in the interest of justice, or in the interest of comity with State courts or respect for State law." 28 U.S.C. § 1334(c)(1). In this case, however, the Court has determined that in light, *inter alia*, of "the highly unusual nature and size of the consolidated proceedings in MDL 1446 and the necessity for efficient administration in a single court," abstention would not be appropriate. August 9 Order at pp. 19-21.

a conceivable claim for contribution and/or indemnity against the Enron estate and/or its directors and officers. These questions have been resolved by this Court, and are not appropriate for interlocutory appeal.

Finally, interlocutory appeal would not advance resolution of this dispute or the broader Enron-related litigation. Essentially, Plaintiffs hope that they can convince the Court of Appeals to throw out the coordinated federal system that New York and Texas federal courts have designed to adjudicate this enormous Enron matter. In so doing, they ignore the intent behind "related to" jurisdiction, broadly defined so as "'to avoid the inefficiencies of piecemeal adjudication and promote judicial economy by aiding in the efficient and expeditious resolution of all matters connected to the debtor's estate.'" *In re Sunpoint,* 262 B.R. at 393 (quoting *Feld v. Zale Corp. (In re Zale),* 62 F.3d 746, 752 (5th Cir. 1995)). *See also In re Wood*, 825 F.2d at 92 (same).

Conclusion

For the foregoing reasons, Defendant JPMorgan Chase respectfully requests that this Court deny Plaintiffs' Motion for Reconsideration and Request for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b), and that it provide to JPMorgan Chase such other relief as it may deem just and proper. Pursuant to Local Rule 7.5, JPMorgan Chase requests oral argument of this motion.

Dated: Houston, Texas
September 27, 2002

Respectfully submitted,

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The Exhibit(s) May

Be Viewed in the

Office of the Clerk

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Defendant's Opposition to Motion for Reconsideration and Request for Permission to Appeal has been served by mail upon the following this 27th day of September, 2002:

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